No. 14789

United States
COURT OF APPEALS
for the Ninth Circuit

MICHAEL R. PLASTINO and RUTH C. PLASTINO, husband and wife,

Appellants,

vs.

ESTBER MILLS and EDNA MILLS, husband and wife; RAY DOUGLAS and PAULINE DOUGLAS, husband and wife; SIGMUND WENDLING and DOROTHY WENDLING, husband and wife; LORAN D. HARVESTON; LYLE SIMMONS; GEORGE HODGDON; C. K. WARREN; and OSCAR TITTLE,

Appellees.

APPELLANTS' OPENING BRIEF

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

I. JURISDICTION of the United States District Court for Oregon is conferred by 28 U.S.C.A. §1332 when proof resulted in a stipulation (Tr. 6) that *diversity of citizenship* existed when all plaintiffs were citizens of Washington and all defendants of Oregon. The *amount*

involved exceeded $9,810.61 which included $1,200 as the value of the land for conveyance of which specific performance is asked. This sum is the exact amount demanded by owners Mills for a deed after his alleged cancellation (Tr. 92). This valuation was *in addition to what had been paid by* appellants and after most of the *timber had been removed. Johnson v. Tapp,* 33 F. 530, 532; *Mattinson v. King,* 150 F. 48, 54. The residue of the amount involved is damages, detailed later (p. 29).

The United States Court of Appeals for the Ninth Circuit has jurisdiction over *reviewable decisions* of said District Court in its appellate circuit under 28 U.S.C.A. §1294, and from all *final decisions* of said District Court under 28 U.S.C.A. §1291. The final decision herein was an order of said District Court made on April 25, 1955, under Rule 73(a) F.R.C.P. denying the plaintiff-appellants' objections and motion made under Rule 52(b) F.R.C.P. to correct the many errors in the findings, conclusions and judgment of said District Court. Notice of appeal was filed May 23, 1955 (Tr. 61).

II. STATEMENT OF THE CASE: Appellants' "Contention of Facts" (Tr. 12-26) was substantially taken from appellees' depositions and substantially proven at trial. (1) *The contract* (Tr. 7) was between Estber Mills and Edna Mills, sellers, and R. F. Hogan and Sally Hogan, buyers, husbands and wives, respectively. It is disclosed in several forms—the original, a photostat copy to prove its recording (Ex. 1), a photostat copy attached to the complaint and Mills' unexecuted copy (Ex. 100) to show his accounting of payment on the back thereof.

The premises owned by Mills alone (Tr. 7) are briefly herein described as Lot 8, situated on a flat promontory between the cities of Garabaldi and Tillamook, having potentialities for residential development, with a view of ocean, coast line and hills, in the neighborhood of fine homes, but brushy, timbered and undeveloped. The features appealing to the buyers are described (Tr. 74-5).

Before modification the contract provisions relevant to errors charged to the trial are—the balance of $1,475 of the purchase price was to be paid in monthly installments of not less than $25 on the first day of each month. In addition, buyers were tc pay taxes, also interest at 6% on the unpaid balance semi-annually. Time of payment and strict performance were made of the essence. On breach, Mills had the right to declare "this agreement null and void and foreclose by strict foreclosure in equity." Also, failure by Mills at any time to require performance by vendees "shall in no way affect their right hereunder to enforce the same, nor shall any waiver by (the sellers) er of any succeeding breach of any such provision, or as a er of any succeeding breach of any provision, or as a waiver of the provision itself" (Ex. 1). It was assigned by Hogans to Plastinos (Tr. 7).

The contract went into effect Nov. 7, '45. It was performed until November '46, with these exceptions: In April, October and November '46 buyers failed to pay the $25 installments as above described. Mills did not follow the contract but did exactly as he later described in his letter of Nov. 29, '46 (Ex. 2) to vendees. The italics are ours and the letter is as follows:

"Received your letter regarding interest on your contract. *I have not followed the contract as it was written. I have charged you with interest as you made your payments and applied the ballance (sic) to the principal.* In doing it this way you will save a few dollars. I have outlined to you just how it has been done, so if you will take your contract and apply these payments as I have you will find the interest is less, but you will owe more on the principal than you thought you owed.

"The $25.00 a month is all right with me. Or if you want to pay more that will be all right also. But if I were you I would pay the $25.00 and *I will take the interest out as you go along.*

"*I had to pay the taxes which I added to the bal.* (sic) You will notice on your tax receipt that there was one acre take (sic) off. This small piece of land lies west of the highway which was in this parcel of land. I kept this out for some of the fishermen have a small house on it. * * *" (Tr. 14).

Thereafter, Mills charged the interest and paid the taxes and included both amounts in the unpaid balance (Mills Dep. 18, 25, 26). Mills followed the above procedure with the Hogans and the Plastinos (Dep. 33). He never advised the vendees of any change in the directions given in Ex. 2 (Dep. 19; Tr. 78). Performance was had by payments (some in advance) through '47 and '48 until on Aug. 16, '48 Mills wrote another letter in answer to the vendees' letter (Ex. 5) describing the conditions surrounding their daughter's family and asking permission to "skip" the August payment until they caught up with their obligations because they were "short" of money (Tr. 76-77). Mills wrote:

"Your letter received and I am just getting around to answer. I am very sorry to hear of your daughter's sickness and hope for the best for her recovery.

"It is quite all right to skip your payment for August and any other time when you are short." (Italics ours) (Ex. 6) (Tr. 14-15)

There were no changes in the contract after Aug 16, 1948. Plastinos were never told anything different at any time (Tr. 77, 96).

II. (2) Practically the only *Performance of the Contract* required of vendees was payment to be made in $25 installments, including interest and taxes, when appellants were not short of money (Ex. 2, 6). Vendees were paying 6% interest for any delays in payment (Ex. 25).

Mills gave no notice of failure or objection to performance through the last payment made about July 1, '50 and for seven months thereafter. The terms dictated by Mills were followed. There had been some "skips" in payment; taxes and interest were added to the unpaid balance and installment payments applied *pro tanto* (Tr. 96). Mills never made any written or oral objection to delayed payments nor made any demand for any payments of installments (Tr. 8) (Dep. 47).

Appellants wrote Mills (Ex. 12) in Feb. '50 requesting a check of their accounting. Mills replied in March (Ex. 13) approving the accounting (Dep. 29) except there was 1¢ difference and they had made 45 installment payments in place of 44 as vendees reported (Ex. 13-A; Dep. p. 29 et seq.).

The first friction occurred in March '50 when Mills reported $124.77 due him for taxes (Ex. 13, 46) (Dep. 30). Previous taxes were '46-'47, $34.36 (Ex. 7), '47-'48, $40.-23 (Ex. 8), '48-'49, $55.35 (Ex. 9). On April 19, '50, appel-

lants complained that the tax on tidelands not purchased by them was included by Mills in their tax bill (Ex. 14). To this Mills agreed and took "the blame" (Ex. 15; Dep. 43), but made no adjustment in the balance to appellants. Nor did he keep his promise (Ex. 15) to have the taxes segregated or the statements sent direct from the Sheriff. Performance by appellants is shown of record (Ex. 24, 25; Tr. 75-6).

No installment payments were made from July '50 to Feb. '51 when a $25 installment was made and refused (Ex. 19, 20, 20-A). Mills had been previously advised of the reasons for nonpayment and promised payments by appellants (Ex. 16, 17). During this period, Mills made no objection. Mills attempted to concel the contract Jan. 1, '51 (Tr. 79).

II. (3) Appellants claim *Mills breached their contract* when Mills sent the "cancellation" letter postmarked Jan. 31, '51, advising: "Your contract was cancelled January 1, 1951 for failure to keep up your payments and taxes" (Tr. 8; Ex. 18). Mills testified he did not know why he had attempted to cancel the contract (Ex. 18) (Dep. 50). It was received by appellants Feb. 7, '51 (Tr. 81) after receipt by Mills of appellants' letter of Jan. 25, '51 advising they would soon start payment and explaining why they had been "short" of money (Ex. 17).

Mills was not heard from after his apologetic letter of April 27, '50 (Ex. 15) until his letter of Jan. 31, '51 (Ex. 18). There were no answers to appellants' letters of Sept. 13, '50 (Ex. 16) and Jan. 25, '51 (Ex. 17). Mills never did anything to terminate appellants' interest in the contract

other than send the letter postmarked Jan. 31, '51 (Ex. 18) (Dep. 49) nor did he ever intend to pay appellants back their money (Dep. 61-62).

II. (4) The following *Tenders under Contract* were made by appellants to keep their contract alive and support their claim for specific performance:

(a) After appellants promise on Jan. 25, '51 (Ex. 17) to continue payment to Mills, appellants by letter dated Feb. 4, '51, mailed Feb. 5, '51, sent a check for a $25 payment (Ex. 17, 19, 20, 102-B) (Tr. 82). This was before they received Mills' cancellation letter (Ex. 18) (Dep. 60). The check was dated Feb. 5, '51 (Ex. 20-A) and was returned by Millls without a letter of transmittal in an envelope postmarked Feb. 7, '51 (Ex. 20). Found by the Court (Tr. 56).

(b) A second tender was admittedly made orally in August or September '53 when appellants discovered the destruction to their property and offered to pay "the balance on the contract" (Dep. 61). Mills refused the offer unless appellants paid him an additional $1,200 (Tr. 92; Mills Dep. 61). This sum was in excess of the amount due. This tender was never mentioned by the Court.

(c) A third tender was made by appellants through their attorney, John Hathaway, on Aug. 26, '53, by tendering a check for $675 (Tr. 95) and enclosing a form of deed acceptable to appellants (Ex. 21, 21-A, 21-B). This was returned by Mills' attorney, Winslow, with a letter (Ex. 22) on Aug. 31, '53. Exhibit 22 was the only answer to any of appellants' tenders. Appellants claim the amount of all tenders were in excess of the amount due because of

damage to the property. This tender found by the Court (Tr. 57).

(d) The fourth and last tender was the deposit in the District Court register of $925 when the complaint was filed Dec. 18, '53. This tender found by the Court (Tr. 57, 58).

All tenders were unconditional and rejected without citing any reason except attorney Winslow's letter of August 1953 (Ex. 22) which was directed to the third tender only.

II. (5) *Destruction of Contract Property:* A stipulation as to the facts of the transaction concerning the timber is set forth in Tr. pp. 8 to 12. While Ex. 1 remained unsatisfied of record, on Dec. 7, '51 Mills delivered a "receipt" to Ray Douglas on payment of $1,500, stating they "hereby sell" all the timber on Lot 8 (Ex. 26). On Dec. 8th Ray Douglas signed a similar "receipt" for said timber to Sigmund Wendling. On Mar. 5, '52, Wendling delivered a timber deed to the Publishers' Paper Company in an effort to sell them said timber, reciting that he was the lawful owner, the timber was free from encumbrances and he would warrant and defend the title (Ex. 28). At no time after Wendling took his "receipt" from Douglas did he ever procure a deed or bill of sale for the timber (Tr. 8). On Mar. 13, '52, the law firm of Koerner, Young, McColloch & Dezendorf wrote Publishers' Paper Company that Wendling did not have title and advised their client how to perfect title (Ex. 29) and rejected Wendling's offer (Tr. 10). Wendling received this letter and held it in his files and told no one

of it. May 5, '52, Wendling knowing he had no title to the timber, made an agreement with the Publishers' Paper Company to deliver 400 M feet of spruce and hemlock at $31 per thousand for grades 2 and 3 and other grades at market price (Ex. 30). He did not specify where he would get the timber, but testified it was from Lot 8 (Dep.....). June '52, Wendling made an agreement with C. K. Warren (Ex. 31) in which Warren contracted to buy said timber and promised to pay Publishers' Paper Co. $1,500 out of the proceeds. All logs were to be delivered to Publishers. Warren instructed Lyle Simmons to cut and he did cut some of the timber (oral agreement). May 24 to 31, '52, Warren had Oscar Tittle cut a logging road through the property (oral agreement). July '52, Warren made a written contract with George Hodgdon to log the timber on Lot 8 and he agreed to pay stumpage in the amount of $1,500. This operation was under a partnership agreement (Ex. 33). Dec. 11, '52, Warren got an agreement from the Mills, extending the time to take off standing and down timber from Lot 8. On Dec. 12, '52, Warren assigned all his right to Loran D. Harveston (Ex. 35).

The above shows the parties, the exhibits (except the oral contracts), show the arrangements and the testimony of all parties show the loss and damage to Lot 8. (Ex. 36 is the highway map from which Ex. 37 (Earl Marshall's survey and map of Lot 8) is made; Ex. 38 gives the stump cruise of hemlock and spruce by W. M. Dockery showing the removal of 321,750 board feet and Ex. 38-A is Dockery's cruise of standing timber, showing 102,000 board feet left. This total shows an excess over Wend-

ling's contract to deliver 400 M feet to Publishers (Ex. 30). Ex. 29 shows the Publishers' Paper Company's accounting of logs received from Hodgdon and Warren totaling 212,720 feet, sold for $7,145.89. Ex. 40 shows the accounting of the Columbia Paper Mills and Ex. 41 shows pictures taken by appellants disclosing the condition of parts of the property after logging had been effected. Those who cut timber from Lot 8 never had a conveyance of the timber from anyone. They made no search of title and neither Mills nor Wendling, who was a logger, would cut any of the timber themselves. This destruction was first known to appellants in August '53 (Tr. 88, 90, 91).

III. SPECIFICATIONS OF TRIAL COURT'S ERRORS: The trial court made, among others, the following errors respecting its Findings:

1. Failure to find and decree the true contract by omitting parts of the contract to which the parties had agreed and performed.

2. Quoting and relying on a forfeiture clause of Ex. 1 without giving effect to Ex. 2 and 6 by which the forfeiture clause was waived (Tr. 54).

3. Citing failures to make installment payments in some months during the years 1948, '49 and '50 and implying thereby that appellants breached the contract and the Court's failing to give effect to Mills letters (Ex. 2 and 6) (Tr. 15) adopted by the Court (Tr. 55).

4. Stating "the contract had been cancelled on Jan. 1, '51 for failure to make necessary installment payments or pay the taxes" (Tr. 55-6) when no notice of rehabili-

tation of the provision, if possible, or any threatened cancellation had been sent prior to Jan. 30, '51 (Ex. 18), nor were taxes to be paid to Mills except in the balance payable under the contract (Ex. 2) and when the appellants were not short of money (Ex. 6). The Court made this finding on taxes in the face of a stipulation by the parties that taxes were under Ex. 2 to be paid by Mills and included in the unpaid balance on the contract (Tr. 8).

5. Failing to find there were legal and sufficient explanation why installment payments were not made and that non-payment was excused by contract; also that time essence provision of Ex. 1 was modified and no notice reasonable or otherwise given to effect its reestablishment (Ex. 2, 4, 5, 6, 7 and 19).

6. Making no findings of fact as to trespass, destruction of appellants' property or damages, but making recitals of narrative facts from which no conclusions were drawn (Findings V, VI and VII; Tr. 56-57).

7. Erroneously finding appellants had abandoned the contract and equitable title without finding any fact which would conclude abandonment. In its findings of abandonment, the Court states a legal conclusion but finds no facts upon which abandonment could be based (Finding IX, Tr. 58).

8. Failing to find appellants had made timely and effectual tenders and that appellees had not done so.

9. Failing to find a confederation among appellees for the unlawful purpose of cutting and removing timber.

10. Failing to award damages for loss and damage to appellants' property and doubling the same and awarding of reduction in purchase price.

Among the Court's errors in the Conclusions of Law are these:

1. Giving any legal effect to the forfeiture clause of Ex. 1 (Tr. 58) because the same has been cancelled by the terms and effect of Exhibits 2 and 6 and the practice of the parties.

2. Failure to recognize and refuse to give any legal effect to Mills letters, Ex. 2 and 6, wherein Mills had authorized and approved the omission of payments, and erroneously reinstating the alleged forfeiture authority without any act of Mills even endeavoring to reinstate the same and based on that error declaring the contract null and void (Tr. 58-9).

3. Concluding the appellants had to communicate with Mills (Tr. 59) when there was no obligation to do so, either alleged or proven, upon which to base such alleged failure and when the evidence proved communications that were made were unanswered by Mills (Ex. 16, 17).

4. Concluding there were no tenders (Tr. 59) when there were four of them.

5. Concluding there was an abandonment of title (Tr. 59) without any finding of fact upon which to base the conclusion.

6. Failure to conclude the appellants were entitled to specific performance.

7. Failure to conclude that there was an unlawful conspiracy to commit a trespass and removal of timber.

8. Failure to conclude the appellants were entitled to damages.

IV. ARGUMENT ON TRIAL COURT'S ERRORS.

(1) The contract was made up of Ex. 1 and two succeeding letters, Ex. 2 and 6. A contract can be created by correspondence. *Shaw Wholesale Co. v. Hackbarth,* 102 Or. 80, 83. It is a judicial function to construe the writings disclosed by the record, namely, the letters heretofore set forth. *Yreka Lbr. Co. v. Lystul-Stuveland Lbr. Co.,* 99 Or. 291, 296. The trial court erroneously failed to decree when vendees missed April, October and November '46 installments, that Mills did "not follow the contract" (Ex. 2); that be brought into existence a new contract concerning the payment of interest and taxes, and when he wrote Ex. 6 he eliminated its time-essence element. *Johnson v. Berns,* 111 Or. 165, 173. By Ex. 2 Mills authorized appellants to pay $25 per month and include in that installment payment of interest and taxes. By Ex. 6 he authorized appellants to "skip" installments when they were "short" of money. The intention of the parties and their acts formed a new meeting of minds and agreement, and the terms of Ex. 1 in conflict therewith were nullified. They could be rehabilitated only by certain procedure dictated by law (IV (3)).

The only difference between Exhibits 2 and 6 in contractual relations was that Ex. 2 was ratified and Ex. 6 was given prior authorization, both were followed by performance (Tr. 76; Ex. 24, 25, 16, 17, 20-A). The con-

struction to be placed by the Court on their prior performance has been declared many times. A typical case is *Miles v. S. P. & S. Ry. Co.,* 176 Or. 118, 125:

> " '* * * There is no more certain way of finding out what the contracting parties meant than to ascertain what they have actually done in carrying out the contract. By so doing we learn what construction the parties themselves have placed upon the terms of their stipulation.' "

Therefore, the trial court erred by refusing to decree the *existence of a full contract* composed of three writings made by the parties and solidified by their agreeable performance for two and a half years (Tr. 76-77; Ex. 24, 25); also by arbitrarily selecting a part only of one instrument (Ex. 2) and entirely ignoring the other part of Ex. 2 and all of Exhibit 6. Appellants relied on these letters and were never told anything different orally or in writing (Tr. 77). Neither did Mills make any demands for installment payments orally or in writing (Tr. 78). There was no change, the same course was always pursued (Tr. 81). There is no record of said Court giving legal consideration to these last named integral parts of the contract. "* * * The court has no authority to read into said contract any provision which does not appear therein, *nor to read out of it any portion thereof.*" (Italics ours). *City of Reedsport v. Hubbard,* 202 Or. 370, 385, the only authority cited by the trial court; *Scheuerman v. Mathison,* 74 Or. 40, 48-49; 17 C.J.S. §296, p. 702. In *Fendall v. Miller,* 99 Or. 610, 617, the court said: "Every word or clause in a written instrument is to be given its full effect if possible to do so."

Ex. 1, 2 and 6 include all the elements of a contract. *Shaw Wholesale Co. v. Hackbarth,* 102 Or. 80, 92; *Johnson v. Berns,* 111 Or. 165, 173. The parties made Ex. 2 and 6 parts of their contract. They were material parts. To ignore them was highly prejudicial. Failure to construe and enforce them made the difference between default and performance.

IV. (2) The trial court *erred in finding vendees breached their contract* (Finding IV, Tr. 55-6). This error grows out of its error in failing to find and give effect to all parts of the contract.

(a) The trial court found a breach on Jan. 30, '51 because no payments had been made for seven months (Tr. 55; Find. IV). But Mills had told appellants they need not pay when they were "short" of money. Appellants told Mills twice (Ex. 16 and 17) they were short and he made no objection until after he was advised on Jan. 25, '51 that payments would be resumed (Ex. 16, 17). Supporting these Exhibits, Mrs. Plastino describes the conditions under which they were written (Tr. 86-87).

(b) The trial court also found as a breach the failure to pay taxes (Tr. 55-6). It gives no effect whatever to the terms of Ex. 2 but the parties did include taxes in the balance to be paid when appellants were able (Ex. 6).

A finding can not be legally made on part of the facts. The omission was called to said court's attention (Obj. p. 3, Par. III).

Mills gave no notice of a change of performance after Aug. '48 (Tr. 81). The parties both pursued the original

methods Mr. Mills suggested (Tr. 81). For all appellants knew the same arrangements and their performance as heretofore made still prevailed. Mills is estopped by statements and conduct from claiming anything different.

Appellants' confidence in Mills' promises is shown by letters Ex. 16, 17. If Mills did not accept their explanations, it was his duty to speak.

Without repetition, there are other allied matters preventing the trial court's finding of appellants' alleged breach. (See "Failure to find full Contract", p. 13) ("Tender", p. 16), ("Waiver" of penalties, p. 20) ("Vendors' Breach", p. 21), (Failure of Vendors' alleged Cancellation, p. 24), (No Abandonment, p. 22).

Based on the above facts and law, the trial court's findings of failure to make "monthly payments" (Find. IV; Tr. 55) and its conclusions (I and III; Tr. 58-9) are erroneous.

(c) The trial court mentions only three of the appellants' four *tenders:*

(i) Their first tender was good (Ex. 19, 20-A). They mailed their $25 check on Feb. 5, '51. They received Mills' cancellation letter postmarked Jan. 31, '51 on Feb. 7, '51 (Tr. 81). If the "cancellation" letter was ineffectual, as appellants claim (See IV (7) p. 24) neither the date of receipt nor the letter itself is material. Appellants' tender was effective because: (1) It complied with O.C.L.A. 72-101, ORS 81.010. If Mills had objections, he had to specify them or all objections are waived. Mills made no objections. He is now precluded from making any. O.C.L.A.

72-103, ORS 81.020. He simply returned the check (Ex. 20, 20-A). (2) Mills' letter (Ex. 18) being ineffectual in law, Mills had no right to refuse the tender, and on refusal he breached his contract (IV (5) p. 21).

This tender and its "positive and absolute refusal" made all further tenders unnecessary: since (1) the law did not require appellants to do a "vain and useless act". *Shaw Wholesale Co. v. Hackbarth,* 102 Or. 80, 91; *Whitney Co., Ltd. v. Smith,* 63 Or. 187, 191; (2) condition precedent to appellants' right to ask the court for specific performance. *West v. Wash. Ry. Co.,* 49 Or. 436, 449. This tender had another effect fatal to Mills' claims and his affirmative defense of "Abandonment" (p. 22).

After appellants had received Mills' "Cancellation" letter (Ex. 18) on Feb. 7th, they did not communicate with him. But when they received back (Ex. 20) their check for the installment payment (Ex. 20-A) on Feb. 7, '51, they saw their Seattle attorney who advised: "When a man sends you back a check and tells you he is going to foreclose, your move is not the next one; it is his, and you wait until you get a notice of foreclosure, and you have your check ready to tender to your attorney" (Tr. 94).

(ii) Appellants made two other tenders. One was their oral offer in August '51 to pay "the balance on the contract" which is admitted by Mills (Dep. 61) and rejected by him when he demanded an additional $1,200 (Mills' Dep. 61; Tr. 92).

(iii) The third and fourth tenders have been described (Statement, p. 7). The deposit in court awaits the

disposition of this Court, as indicted in *Equitable Life Assur. Soc. v. Boothe,* 160 Or. 679, 683.

IV. (3) Assuming (contrary to fact) that Ex. 1 (containing the only penalty clause) was alone the contract, appellants prove any *breach of the contract was waived* and thereafter the *law required notice of a reasonable time to make payments,* before the penalty clause, if any remained, could be invoked.

It is reasonable to assume Mills knew the forfeiture clause was not self-executing, and therefore he had to send his cancellation letter (Ex. 18). But whether he knew it or not, the law in such a case as this allows forfeiture only after notice and the allowance of a reasonable period to comply with the demand. No notice was ever sent. This fact alone is fatal to Mills' claim of right of forfeiture. The courts place great emphasis upon this notice of rehabilitation. It is recognized by the following authorities:

The trial court announced this legal principle which is fatal to Mills' case (Tr. 86-7). Why it was not again referred to or followed, is not known to appellants.

Grider v. Turnbow, 162 Or. 622, 640, quotes from *Epplett v. Empire Investment Co.,* 99 Or. 533, 541:

> " 'Since contracts like the one here are not self-executing, the law by implication introduces into such contracts a provision that the right of forefeiture should be exercised only after first giving notice for a reasonable period of time, or rather, speaking figuratively, the invisible and omnipresent hand of the law writes such a provision into the contract; and, therefore, the right to forfeiture can not be fully exercised unless: (1) the vendor gives reasonable notice; and (2) the purchaser fails to pay within the time fixed by the notice.' " Also

> "The clause in the contract providing that time shall be of the essence thereof is for the benefit of the vendor, and it may be waived by him. The waiver may be effected by the acceptance of payments past due without insisting upon punctuality. When once waived, the provision for forfeiture is of no avail to the vendor unless he first gives to the purchaser reasonable notice of his intention in the future to insist upon strict performance on his part of the terms of the contract. This rule of law is so well established that no citation of authority is necessary to support it." (162 Or. 622, 641)

Norton v. Van Voorst, 191 Or. 577, 585; *Smith v. Carleton,* 185 Or. 672, 682; *Gray v. Pelton,* 67 Or. 239, 244.

IV. (3) (a) Mills' acts described in Ex. 2, 6 and 25 were within the legal definition of *"Waiver",* i.e.: "an intentional relinquishment of a known right." This includes *knowledge* of the existence of the right and an *intention* to relinquish it. *Johnson v. Feskens,* 146 Or. 657; *Mathers v. Wentworth & Irwin, Inc.,* 145 Or. 668; *Smith v. Martin,* 94 Or. 132, 138; *Propst v. William Hanley Co.,* 94 Or. 397, 402.

Up to Nov. 29, '46, Mills had the optional right to either declare the contract void *and strictly foreclose* (the declaration alone was *not sufficient* under the contract terms); or he could accept delayed payments and continue the contract. As the courses were inconsistent, he could not do both. *Rynhart v. Welch,* 156 Or. 48, 53. He chose the latter and thereby waived the right to rescind. *Johnson v. Feskin,* 146 Or. 657; *Miller v. Beck,* 72 Or. 140, 142. Waiver is inferred whenever vendors' conduct

is inconsistent with their enforcing forfeiture. *Geroy v. Upper and Knight v. Barry,* 182 Or. 535, 542.

"Waiver" and "Estoppel" are not different terms in this case. They mean the same thing. Either or both apply to Mills' statements and conduct toward appellants. The principles are mingled into one another to prevent an unjust result. *Smith v. Martin,* 94 Or. 132, 142; *Kimball v. Horticultural Fire Relief,* 79 Or. 133.

IV. (4) The trial court sought to invoke the waived *forfeiture clause* of Ex. 1. The simple clause is quoted four times (Tr. 46, 52, 54, 48). When Mills by his letter (Ex. 2, Nov. 29, '46) released appellants from making payments of interest and taxes in addition to the $25 installment, and by Ex. 6, Aug. 16, '48, released appellants from making monthly installments when they were "short" of money, he released that much of performance required of the appellants by Ex. 1, and the "failures" described in Finding IV (Tr. 55, 81). When he authorized "skipping" payments he nullified the time-essence terms. When appellants did not violate any terms of their contract, there were no grounds for forfeiture.

The much quoted forfeiture clause related to "any provisions hereof" and referring to Ex. 1. It did not relate to letters not then in existence, such as Ex. 2 and 6. Even by wishful thinking the forfeiture provision could not apply to the new terms contained in Ex. 2 and 6 made approximately a year and more later. The record is totally void of any intention of any of the parties to apply the forfeiture clause of Ex. 1 to either Ex. 2 or 6.

Forfeiture is a harsh way of terminating contracts. If Mills insists upon it, he must establish such right by clear and convincing proof. *Share v. Williams* (Ore. 1954) 277 P. 2d 775, 780; *Stennick v. J. K. Lumber Co.,* 85 Or. 444, 475. But Mills at no time indicated appellants' contract, as modified, was not in the same status as it was when he theretofore accepted late payments (Tr. 79).

To allow a forfeiture in this case would violate the principles declared in *Zumstein v. Stockton,* 199 Or. 633, 639; *Johnson v. Feskens,* 146 Or. 657, 661.

This point was squarely before the trial court (Tr. 16).

IV. (5) The trial court erred in not decreeing the *vendors had breached their contract* (See "Statement" II (3). Mills rely on their "cancellation" (Ex. 18) to support their rejection of the Feb. 5, '51 tender. (See "Tender", p. 16). If the cancellation was a nullity (Cancellation, p. 24), the modified contract still prevailed and Mills' breach is based on his unequivocal refusal of performance (Ex. 19, 20, 20-A).

Notice required by law might have been given before or after payment (Ex. 20) by "* * * fixing a reasonable time within which payment might be required; but the rights of the purchaser under a contract not absolutely terminated cannot be extinguished by a summary declaration of forfeiture." *Higenbotham v. Frock,* 48 Or. 129, 131. The "positive and absolute refusal by one party (Mills) to carry out the contract is in itself an immediate complete breach of it on his part, and gives immediate right of action." (Ex. 18). *Shaw Wholesale Co. v. Hackbarth,* 102 Or. 80, 90.

IV. (6) The trial court erroneously found that appellants had *abandoned* their "unperfected equitable title" (Find. IX; Tr. 58) and concluded to the same effect ((II, Tr. 59). The idea originated in the letter of Mills' attorney (Ex. 22) referring to the contract. Later it was applied by the Court to the estate. Abandonment is defined as follows:

> "It has often been held that to constitute an abandonment there must be an intention to abandon, and that intention must be accompanied by some act by which the property is actually abandoned. * * * It is an affirmative defense and to succeed, the intent may be derived from all the facts and circumstances of the case, but there must be a clear, unequivocal and decisive act of the party to constitute abandonment in respect of a right secured—an act done which shows a determination in the individual not to have a benefit which is designed for him." *Dober v. Ukase Inv. Co.,* 139 Or. 626, 629.

The trial court pinpoints the date of abandonment as the week between Jan. 30, '51 (Ex. 18) and Feb. 7, '51 (Ex. 20) (Find. IX, Tr. 58) and its basis as "failure" (1) "of plaintiffs (appellants) to communicate with defendant Estber Mills" (Op. Tr. 52), and (2) "to tender the amount due for a period of more than two years after their $25.00 check was returned to them." (Tr. 52) (See "Tender", IV (2) (c) p. 16).

The inadequacy of the evidence to prove abandonment is disclosed by the following: There is no evidence between Jan. 30 and Feb. 7, '51 (or any other time) of any *intent* or *act* to abandon appellants' property. At that time the evidence shows appellants immediately procured legal advice as to the course to pursue (Tr. 94-5).

The trial court's basis for abandonment is "failure" which is the negation of required action. Abandonment is based on a voluntary relinquishment disclosed by "clear, unequivocal and decisive acts" which "constituted a virtual, intentional throwing away." *Hull v. Clemens,* 200 Or. 533, 547. Appellants had no duty to "communicate" with Mills because of Mills' breach of contract (IV (5) supra). After Mills' unconditional refusal to perform the contract by returning the payment, the law did not require appellants to do a "vain and uselss act" by "communicating" with Mills. *Whitney, Ltd. v. Smith,* 63 Or. 187, 191.

The same principle applies to the court's erroneous requirement of further tender. The $25 tender was rejected in Feb. '51. It was unnecessary to make the three other tenders rejected subsequently. On what evidence can the Court say a tender between Feb. '51 and Aug. '53 would have been successful or required?

"Abandonment" is not presumed from lapse of time. "An intention to abandon property for which a party has paid a consideration will not be presumed. * * * The burden of showing an abandonment rests on the one who asserts it." *Dober v. Ukase Inv. Co.,* 139 Or. 626, 629.

The trial court found "plaintiffs abandoned their unperfected equitable title" (Find. IX, Tr. 58). Such is a conclusion of law. There are no facts upon which a "finding" can be based. Therefore the Conclusion (II, Tr. 59) is a nullity. The trial court should have found from the evidence, if possible, facts disclosing an *intent* to abandon, either expressed or implied, and a "clear, unequivocal and

decisive" act which carried the intent into effect. Assuming contrary to fact, that proof of abandonment existed, the trial court made no Finding thereon, consequently there was nothing to support its conclusion, and nothing on which to base its judgment. *Darling v. Miles,* 57 Or. 593, 596.

IV. (7) Mills' letter (Ex. 18) was ineffectual as a *cancellation* of either appellants' contract for deed or their equitable estate.

"Cancellation" necessitates an *intent* and a *concurrent act. Yont v. Eads,* 57 N.E. 2d 531, 532. The *act* must be one of surrender manifesting the *intention* to cancel. *Hickox v. Hickox,* 151 S.W. 2d 913, 917-8.

Mills' letter mailed *Jan. 31,* showed the *only intent* to be one of cancellation on *Jan. 1.* But there was no *act* on Jan. 1. The terms of the letter do not allow interpretation that he *intended* to cancel Jan. 31, '51, the date he mailed the letter or that he *intended* the letter to act as notice of default and demand for payment. There is no such wording. The trial court had no power to read into Mills' letter anything Mills did not say, or to find *intent* and *act* concurrent when they were not. ORS 174.010; *City of Reedsport v. Hubbard,* 202 Or. 370, 385; *Scheuerman v. Mathison,* 74 Or. 40, 48-9.

The letter can not be construed as "reasonable notice" (IV (3)) because no time was allowed for performance. He testified he did not know why he sent it (Dep. 50). But it seems obvious he wanted to prevent appellants making their payment (Ex. 20-A) previously promised (Ex. 17).

IV. (8) The trial court makes extended recitals in its opinion (Tr. 46-53) and findings (Tr. 53-58) on confederacy of appellees which resulted in substantial loss to appellants. But it draws no conclusions therefrom nor passes judgment thereon. The error appellants present is a lack of consideration and conclusion by the trial court of a serious claim for damages caused by the joint action of individuals engaged in an unlawful purpose. This matter was before the court, as conclusively shown by the pretrial order (Tr. 5-6, 8-12, 19-24).

Without repetition, the confederacy or conspiracy (nomenclature is not an issue) is shown herein (II (5)), by depositions (Ex. 50-54), the reporter's transcript, consolidated testimony in the pretrial order (Tr. 5-6, 8-12) and the section herein on "Unclean Hands" (p. 30).

The trial court briefly commented on "confederacy" and "conspiracy" (Tr. 50, 58) but what it was actually told is disclosed by the following quotations delivered in appellants' trial brief:

> "(1) *Definitions: Confederacy* (P.O. pp. 16, 21, 25). Defendants' acts come within the definition of confederacy: 'An act of confederacy is when two or more persons combine together to do any damage or injury to another or to do an unlawful act.' *Watson v. Harlem & N. Y. Nav. Co.,* 52 How. Prac. 348, 353.
>
> "*Conspiracy* has been defined as: '* * * *a combination of two or more persons by some concerted action to accomplish some* criminal or *unlawful purpose* or to accomplish some purpose not in itself criminal by unlawful means.' (Italics ours). *Pitts v. King et al.,* 141 Or. 23, 28; 12 *C.J.* 540, §1; *State v. Goodloe,* 144 Or. 193, 196. * * *

"*Joint tort feasors* are where 'different persons owe the same duty and their acts naturally tend to the same breach of that duty, the wrong may be regarded as joint and both may be held liable.' 62 *C.J.* 1130, §44.

" 'The rule is well settled that joint liability exists where the wrong is done by concert of action and common intent and purpose, provided that the act of each person was an efficient cause contributing to the in jury. Proof of a conspiracy is not necessary.' 62 *C.J.* 1135, §47. * * * All are liable for the acts of another in the scope of the joint enterprise. *Shaw v. Moon,* 117 Or. 558, 564. * * *

"It is not necessary that the charge of conspiracy be established by direct and positive evidence. *Rouse v. Equitable S. & L. Ass'n.,* 151 Or. 427, 435. In the present case the proof, however, is almost entirely documentary evidence.

"The allegations of confederacy or conspiracy are important only in order to cement the various defendants into the transaction by which plaintiffs were damaged and to charge them with the acts and declarations of each other as co-conspirators. *Gabriel v. Collier,* 146 Or. 247, 255.

"The actual facts of conspiracy may be inferred from circumstances. *State v. Hyde* (Civil) 88 Or. 1, 33. The concurring conduct of the defendants need not be directly proved. *Wilson v. McCarthy,* 66 Or. 498, 501.

"While circumstantial evidence is sufficient to establish the conspiracy, herein is direct evidence pointing unmistakably to the conclusion that each defendant had a part in the chain of proximate cause by which the plaintiffs lost part of their estate. The basic action of defendants on which liability is predicated is documentary. To prove their authority, these defendants voluntarily produced and delivered their contracts and assignments. Other documentary proof,

such as 'Receipts', proposed deed and legal opinion of title failure, were procured from other parties. All these showed a common purpose to acquire and for various reasons pass on to another or other defendants the presumptive privilege of removing timber or logs from Lot 8. While not essential, the cementing of these relations was based on monetary valuations in each defendant. Mills received $1,500 from Douglas; Douglas had the continued trade of Wendling in his beer tavern which apparently was worth more than the $100 offered by Wendling and refused by Douglas; Wendling received $1,500 from Publishers' Paper Company through Warren (Ex. 32) (Wendling's Dep. 62); Warren received $225.00 from Harveston (P.O. p. 17); Tittle received $315.00 from Warren (P.O. p. 17); Simmons received from Hodgdon $400.00 (P.O. p. 16); Hodgdon got at least $2,-700 from Publishers, $1,500 of which was given him by Wendling and Warren (Ex. 32); and Hodgdon and Warren received together something like $7,145.89 from Publishers (Ex. 39). Harveston did not have time to work out his investment. * * *

"Defendants had notice of plaintiffs' estate at least on and after April 11, 1950 (Ex. 23) and before any of them became involved. Defendants' concerted action began not earlier than December 7, 1951 (Ex. 26) and the destruction of plaintiff's estate occurred between July of 1952 and December 1953, and all these acts were aimed at a single result,—the trespass and conversion of timber on Lot 8, and accrued to defendants' respective use and benefits, directly or indirectly. It has long been held that such wrongful acts may be counted upon collectively as the destruction of one's property in an *action on the case. Cash v. Garrison,* 81 Or. 135, 139. This case involved a long series of various acts and delinquencies and took on the aspect of various causes of action *ex contractu* and in tort, culminating in the wrecking of plaintiffs' business for the benefit of defendants, against whom judgment was entered. An action on the case

is in the nature of a conspiracy and judgment may be entered against joint defendants with proof of conspiracy. *Condit v. Bodding et al.,* 147 Or. 299, 328.

"Whatever the nomenclature here used may be, the facts are all before this Court. In such case the Court said: '* * * we see neither reason nor justice under our modern system of pleading in denying him (the plaintiff) that right simply because of a theoretical distinction not always easy to perceive, between a direct and consequential injury.' *Kunnhausen v. Stadleman,* 174 Or. 290, 299.

"In this case the overt act consumating conspiracy is the cutting of timber, and the acts so done result in damage to the plaintiff (12 *C.J.* p. 581, §100). That damage must be the natural and proximate results of the defendants' acts. 12 *C.J.* 582, §100.

"*Proof of Conspiracy:* The order for receipt of testimony is largely in the discretion of the trial court. Conspiracy may be implied from circumstances and the concurring conduct of the defendants need not be directly proven. *State v. Lewis,* 51 Or. 467, 469.

"*Effective Conspiracy:* Each conspirator is bound by the acts and declarations of his associates while engaged in the furtherance of the common design, although the conspirator may be unaware of the identity of his co-conspirator actually performing the act or uttering the declaration. *O.C.L.A.* §2-228 (6); *O.R.S.* 41.900; *State v. Boloff,* 138 Or. 568, 593."

If conspiracy were not proven, appellants could recover from those guilty of the tort. *Howland v. Corn,* 232 F. 35, 40.

The appellees were made parties for two purposes: to collect damages from those who were liable and to quiet title against those who must have asserted some title to have so dealt with appellants' property.

IV. (9) The extent of *timber damage* is shown by appellants' cruise, the only one offered by any party. This showed 321,750 board feet (Tr. 65) of good quality, cut from Lot 8—100,140 feet of spruce and 221,610 feet of hemlock (Tr. 66). There was left standing as the subject of severance damage 102,00 board feet of which 75,000 was spruce and 27,000 was hemlock (Ex. 38, 38-A) (Tr. 66). There is corroboration in Ex. 39, 40. The condition of the property after logging is shown by rainy day snap shots (Tr. 92, 83; Ex. 41).

Using Marshall's maps (Ex. 36, 37; Tr. 67) and checking Dockery's cruise (Ex. 38, 38-A; Tr. 68, 71-2), W. Henry Thomas, admittedly qualified (Tr. 21-2), testified the fair market value of the timber on Lot 8 in June 1952 (Tr. 69) (when logging started Tr. 68) was $3,049.61 (Tr. 68). The fair market value of timber removed was $2,437 and of the remnant standing $612 (Tr. 70). *O & C Rd. Co. v. Jackson,* 21 Or. 360, 363; 15 Am. Jur. p. 513, §106.

The law contemplates that injury to the freehold may occur separate from the value of the timber, and the measure of that damage is determined by the difference in the value of the land immediately before and after the consumation of the wrongful act. *Moss v. Peoples Calif. Hydro-Electric Co.,* 134 Or. 227, 231. One witness whom the trial court rather arbitrarily dismissed fixed this difference at $3,000 (Tr. 73). Two others fixed the value before removal of timber at between $3,200 and $3,500 (Tr. 110) and thereafter reduced 75% (Tr. 110) in June '52 (Tr. 109). Witness Kerr—$3,400 (Tr. 115) as against the June value of $1,200 (Tr. 117). Such damage is recoverable.

Hanns v. Friedly, 181 Or. 631, 642; *Huber v. Portland G & C Co.,* 128 Or. 363, 367.

No logger of Lot 8 cleared the slashings, but left them to constitute a fire hazard (Tr. 66, 69, 73; Ex. 48, 49). Damage in the form of clearance is $350 to $400 (Tr. 69).

(a) The value of timber unlawfully removed is (without any counter valuation) fixed by Engineer Thomas as $2,437 (Tr. 70). This should be doubled (ORS 105.815) or trebled (ORS 105.810). At least the doubling would be a boon to these long suffering appellants. Between the trial in May '54 and the decision on Mar. 18, '55, two important cases affecting appellants' rights were decided, the *Reedsport* case 202 Or. 370 which was the only authority cited by the court and the other is *Kinsula Lbr. Co. v. Daggert,* 281 P. 2d 221, 225. Appellants request the appellate court consider their cause as meriting the application of the principles of the *Kinzula* case. *Erie R. Co. v. Thompkins,* 304 U.S. 64, 77; 82 L. ed. 1188.

(b) Appellants' acreage of 43.46 "acres more or less" (Ex. 1) is reduced by 8.72 acres (Tr. 64; Ex. 37). At the purchase price of $36 per acre, the reduction amounts to $324. *Whitney Co., Ltd. v. Smith,* 63 Or. 187, 192, authorizes a *pro tanto* performance and reduction in purchase price sufficient to cover the deficiency. *Thompson v. Hawley,* 16 Or. 251, 255.

IV. (10) *"Unclean Hands":* Deception, fraud and unfair practices permeated this entire logging operation. The following pinpoints some of the culpability:

Mills was the fountain of iniquity. He had a recorded contract of sale of Lot 8 outstanding (Tr. 7; Dep. 13);

he told no one of it (Dep. 55); he misrepresented the tax liability of appellants and tried to lay it on innocent girls in the sheriff's office, he knew the tax statement which he sent to appellants was false; he took the "blame" (Ex. 15); he never made any response to this overcharge except to write "so what?" (Ex. 15; Dep. 38); he attempted to forfeit appellants' equity in a manner repugnant to the trial court (Tr. 51); his testimony seems controlled by his interests rather than his integrity; he executed the first "receipt" (Ex. 26) which totally lacked words of conveyance. O.C.L.A. §70-101; ORS 93.010; *Lambert v. Smith,* 9 Or. 185, 191. It could not be given the effect of a conveyance unless it contained such words. *Capell v. Fogar,* 30 Mont. 507, 517. He testified his conscience did not hurt him when he charged "these kids" (the Hogans) $1,575 for land which he swears at the time was worth but $50 (Tr. 97) excusing himself on the basis: "if they come after you" (Tr. 97). He represented and sold 43.46 acres (Ex. 1) without knowing the amount was there (Dep. 14). He testified he did not change the terms of the contract (Dep. 15) but followed it (Dep. 16). His own record proves such statements false (Ex. 2, 6 and 25; Dep. 17, 18). Mills initiated the chain of causation on Dec. 7, '51 (Ex. 26) and assisted in its final unlawful stages in Dec. '52 (Ex. 34; Tr. 104).

Douglas procured and passed on the same type of "receipt"; was the conduit who made the whole illegal business possible, released the Pandora box of trouble, is not disassociated from Mills and Wendling whom he served. Lack of monetary compensation is not material (Ex. 26; Tr. 100-2).

Wendling is nefarious, a gypo logger (Tr. 19), started the deal (Tr. 8, 100-2); tried to sell by timber deed (Ex. 28) to Publishers' Paper Co. to whom he contracted to sell 400 M board feet of logs from Lot 8 (Tr. 9; Ex. 27). Publishers refused to buy and delivered to him a legal opinion from a reliable law firm that he had no title on Mar. 13, '52 (Ex. 29; Tr. 10). He admits a mistake he did not correct the title (Tr. of Proceed. 154), was a logger (Tr. 19), but did not log Lot 8 himself (Tr. 19), was not going to lose his $1,500 so contracted on May 5, '52 (less than two months after he knew he had no title) to sell Publishers' Paper Co. 400 M feet of spruce and hemlock without telling them the logs came from the same Lot 8 (Ex. 30; Tr. 10, 98); he assisted in removing 250 M to 300 M feet (Tr. of Proceed. 140). By June '52 he hooked Warren to log Lot 8 (Ex. 31; Tr. 10, 103, 104), and required the sale be made to Publishers so that he had Publishers liable to him for his $1,500 (Ex. 32) which he was finally paid (Tr. 11). In contracting with Warren (Ex. 31), he did not make the covenants that he had proposed in the timber deed (Ex. 28), showing his knowledge of lack of title and consequential fraud. When he saw he was in a "jam", all he wanted was his money back (Tr. 11). The activity of Warren is described in Tr. 10-11, 102-6, of Hodgdon in Tr. 11, and of Simmons in Tr. 107-8.

None of appellees secured title reports, made inquiry themselves as to the title to the timber, delivered any documents of conveyance, ran any lines, made any survey, claimed they kept no records (none were produced) and made no releases between themselves (Tr. 104). All had a common purpose of taking timber they did not own.

He who fails to inquire is chargeable with all facts which he might have ascertained on proper inquiry. *Musgrove v. Bonser,* 5 Or. 313, 317. Lyle Simmons said the job "stunk" (Tr. 107) and without authority their taking the timber was just the same as "stealing" because they "had no business there" (Tr. 108). This bit of integrity stands out like a "good deed in a naughty world". All were guilty of patent misconduct.

Authorities are many that he who comes into equity and asks for relief must come with clean hands. *Saling v. First National Bank of Tillamook,* 93 Or. 237, 246. Otherwise those guilty of misconduct will not be relieved of the consequences of their wrong doing. *Blake v. Kimble,* 120 Or. 626, 630.

V. The trial court states that in Hogans' two admitted assignments to appellants (Ex. 1 and 23), the latter did not agree to assume the payments (Tr. 47, 55). If such statements are intended to indicate appellants lacked authority to protect their rights, it is both immaterial and incorrect.

In *Corvallis & Alsea River R. Co. v. Portland E & E Ry. Co.,* 84 Or. 524, 539, the court said: "* * * the assignment of a contract operates not merely as an assignment of the moneys thereafter to be earned, but of the whole contract with its obligations and burdens. After the same has been modified by the parties thereto, it is an assignment of the contract as modified." Appellants were by assignment possessed of a right to sue. *Collins v. Heckart,* 127 Or. 34; ORS 80.010.

VI. The trial court did not decree specific performance because of two errors: (1) it did not decree the modified contract as performed by the parties and (2) it invoked the forfeiture penalties of the old contract which were specifically waived and nullified by the vendors' later agreements and were made ineffectual thereby.

Appellants submit that a contract has been established which will authorize a decree that the parties should specifically perform (Ex. 1, 2 and 6). The established contract belongs to a class capable of being enforced because it has requisite elements. 4 Pomeroy "Equity Jurisprudence" (5th Ed. 1941) p. 1024, §1399; p. 1033, §1401; p. 1034, §1402; pp. 1042 to 1053; ORS 93.020 (O.C.L.A. §2-906. While appellants have neither title nor possession, jurisdiction in such cases depends on whether the interest to be protected is equitable in its nature. An equity proceeding is generally invoked to obtain both. When an estate or interest is to be protected, equity takes jurisdiction for that purpose because, as herein, legal remedies are not possible nor adequate. Equity converts the equitable estate into a legal one and completes its remedy by awarding legal relief when it can do a more perfect and complete justice such as awarding damages. 4 Pomeroy, p. 1028. There are many Oregon cases to the above effect, including *Temple Enterprises, Inc. v. Combs,* 164 Or. 133, 158, which holds vendors may be required to perform so far as they are able.

Appellants submit their remedial right is perfect in equity as one wherein the court can exercise its "sound judicial discretion controlled by established principles of

equity and exercised upon a consideration of all the circumstances * * *." 4 Pomeroy p. 1040, §1404; *Goodyear Tire & Rubber Co. v. Mills,* 22 F. 2d 353.

Oregon statutes give a complete remedy and equity has concurrent jurisdiction with courts of law (ORS 11.-020) against all appellees (ORS 13.160) and the decree of this court shall be equivalent to a deed from the Mills (ORS 23.020; ORS 93.730).

The contract herein is established beyond the necessary preponderance of evidence and the conveyance may be decreed even though encumbered in a manner not originally contemplated and a perfection of title or its equivalent enforced by the decree itself. *West v. Wash. Ry Co.,* 49 Or. 436.

The equity court does not require appellants to bring a second or other suit at law because having acquired jurisdiction, it will do full justice even to decreeing a recovery of damages. *Walker v. Mackey et al.,* 197 Or. 197, 209; *Lockhart v. Ferrey,* 59 Or. 179, 185; *Temple Enterprises, Inc. v. Combs,* 164 Or. 133, 155.

VII. In conclusion, appellants ask the relief prayed for in their complaint.

Respectfully submitted,

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Dated: Portland, Oregon

November 4, 1955.